US EPA ARCHIVE DOCUMENT

A-2001-31
II-H-35

Intel Corporation
5000 W. Chandler Boulevard
Chandler, AZ 85226-3699
(480) 554-8080
www.intel.com

May 14, 2002

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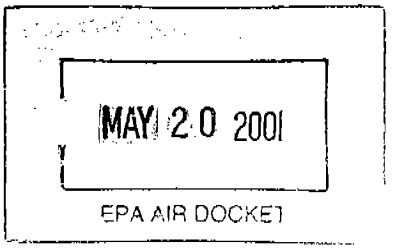
Air and Radiation Docket and Information Center
Docket Number A-2001-31
U. S. Environmental Protection Agency
401 M. Street, SW
Room M-1500 (Mail Code 6102)
Washington, D. C. 20460



Re: Intel Comments on Options Presented at Public Meetings on Implementation of Revised Ozone NAAQS

Dear Sirs:

Intel Corporation (Intel) submits the following comments in response to the various options presented by the U. S. Environmental Protection Agency's (EPA) on the implementation of the 8-hour ozone national ambient air quality standard (NAAQS) at a series of recent public workshops. These comments build on the Intel position paper (Intel paper) submitted by Intel to EPA following a conference call with EPA on June 6, 2001. These comments focus on what Intel considers the three key implementation areas addressed in the workshops: classification under the 8-hour standard, repeal of the 1-hour standard, and flexibility in implementation under Subpart 2. More detail on the positions noted in these comments is found in the Intel paper, which is incorporated by reference.

During the public workshops on each area, EPA listed a number of options that it was considering. The various options are difficult to comment on individually or in isolation because the validity of some of the options depends on how they are incorporated into a single implementation strategy. Accordingly, in the context of discussing the options in the three key implementation areas, these comments focus on the legal principles that EPA should consider in developing an 8-hour ozone NAAQS implementation rule.

1. Implementation of the revised ozone standard must comply with the U.S. Supreme Court decision

The implementation of the revised ozone standard, at a minimum, must comply with the decision of the U.S. Supreme Court in *Whitman v. American Trucking Assn.*, 531 U.S. 457 (2001). The Court set out the basic parameters within which EPA could exercise its authority. The Court found EPA's implementation policy to be unlawful because the simultaneous implementation proposed by EPA would have completely

ignored Subpart 2 and thus upset its carefully designed structure, which Congress clearly intended to apply for at least a set period of time. The Court's specific holdings were as follows:

- The switching provisions require implementation under Subpart 1, unless Subpart 2 makes it clear that it applies.
- EPA cannot use Subpart 2 exclusively to implement the revised ozone standard.
- Nor can EPA use gaps in Subpart 2 to completely ignore any "textually applicable" provisions in Subpart 2.
- The time period that EPA grants nonattainment areas to achieve attainment with the revised 8-hour ozone standard must be at least as long as that allowed in Subpart 2 for the current 1-hour ozone standard.
- EPA must determine how Subpart 1 and Subpart 2 interact to implement the revised ozone standard because the relationship between the two subparts is ambiguous.

Interestingly, the options listed in the workshops appear to be based on a belief that the Court told EPA it had to implement the revised ozone standard, at least in part, under Subpart 2. That is not the case. The Court merely held that the Clean Air Act (CAA) was ambiguous as to how Subparts 1 and 2 interact in implementing the revised ozone standard. The only relevant mandate the Court issued is that simultaneous implementation went beyond what was ambiguous because it rendered the structure of Subpart 2 a "complete nullity."

The Court was specifically concerned that EPA's implementation policy would force nonattainment areas to come into compliance with a more stringent standard as quick or quicker than the current standard: "[I]f EPA's [simultaneous implementation] interpretation were correct, some areas of the country could be required to meet the new, more stringent ozone standard in *at most* the same time that Subpart 2 had allowed them to meet the old standard. ...An interpretation of Subpart 2 so at odds with its structure and manifest purposes cannot be sustained." 531 U.S. at 485-486. Hence, the Court determined that EPA's implementation policy had to take into account any "textually applicable" provisions in Subpart 2, but the Court did not identify them. That ambiguity the Court left for EPA to decide.

Accordingly, the Court never held that the revised ozone standard could not be implemented *entirely* under Subpart 1, nor did the Court require that it must be implemented under Subpart 2. In fact, the Court disagreed with the D.C. Circuit Court of Appeals holding that Subpart 2 is the sole means of implementing the revised ozone standard. *See* 531 U.S. at 481. The Court also did not say that the ambiguity between Subpart 1 and 2 authorized EPA to rewrite or otherwise change express, clear language of the CAA. *The Court's primary holding was EPA could not implement the revised ozone standard in a manner that upset the structure of Subpart 2 (that is, completely ignoring its provisions notwithstanding the fact that some of them may be relevant).*

2. **Best approach to implementation would be one that does not attempt to change the structure and clear language of Subpart 2, but fulfills the intent and purpose of that Subpart.**

Based on the Court decision, Intel believes the only clear legal approach to implementation of the revised ozone standard would be one that does not attempt to change the structure of Subpart 2, but fulfills the intent and purpose of that subpart. Unfortunately, Intel does not believe such an approach is one of the options offered. As noted in the Intel paper, that approach would be to:

- Implement the 1-hour ozone standard under Subpart 2 until:
  - An area "attains" the 1-hour standard or
  - The 1-hour standard is revoked once all measures under Subpart 2 are implemented,
- Implement the 8-hour ozone standard under Subpart 1 *after* the area attains the 1-hour standard or the 1-hour standard is revoked; and,
- Retain any requirements in the implementation of the 8-hour standard under Subpart 2 that are textually applicable (*i.e.,* requirements that have not been exhausted and can be applied without rewriting them to make them comport with a revised standard), such as the requirements for ozone transport under Section 184.

Continued implementation of the 1-hour ozone standard under Subpart 2 for areas in nonattainment with the current standard fulfills the express text and intent behind that subpart.[1] Implementation of the 8-hour standard under Subpart 1, once such areas meet the 1-hour standard under Subpart 2, does not subvert the intent of Subpart 2. Rather, it fulfills the intent of Subpart 2, particularly if any "textually applicable" provisions of Subpart 2 are retained.

3. **Classification of the 8-hour NAAQS under Subpart 2 would, at a minimum, require revision to the design values and timelines in Table 1, which is unlawful**

EPA's four options on 8-hour implementation can be categorized into two approaches: an approach requiring classification totally under Subpart 2 and a split approach requiring classification under Subparts 1 and 2. As noted above, Intel believes EPA should include a third logical approach of implementation generally under Subpart 1 (but preserving "textually applicable" provisions of Subpart 2).

[1] In its argument to the Court, EPA agreed with this position. EPA recognized that under the CAA the revised ozone standard should be implemented under Subpart 1. EPA stated "EPA has consistently explained its preliminary view that the revised ozone NAAQS should be implemented in accordance with Subpart 1." Reply Br. at 17, n. 21

a. Classification under Subpart 2 only (Options 2 and 3)

Options 2 and 3 are variations on the same theme; the only difference is in the flexibility provided to areas that will attain the revised ozone standard in the short-term (*i.e.*, before a SIP would be required to be submitted). Both options require implementation under Table 1 of Section 181(a) in Subpart 2 ("Table 1") using the 8-hour ozone design values and both suffer from the same legal deficiencies:

- Options 2 and 3 would require EPA to rewrite Table 1 so that it could be applied to the 8-hour standard.
- EPA has no authority or discretion to rewrite Table 1.
    - The classification scheme in Table 1 is tied to 1-hour design values, which are inconsistent with the revised ozone standard.
    - It is not possible to use the design values, classification scheme and deadlines of Subpart 2 to implement the 8-hour standard without significantly modifying them.
    - Indeed, EPA recognizes that to make Options 2 and 3 work they would require a "regulatory" change to a statute. There is no legal precedent for this kind of statutory interpretation approach.
- Numerous U.S. Supreme Court decisions require agencies to implement laws as written, unless the law is ambiguous. *See American Petroleum Institute v. United States EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208; 102 L.Ed.2d 493; 109 S.Ct. 468 (1988) ("it is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress"); *Chevron*, 467 U.S. 837, 843; 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").
    - The Court holding that the interaction between Subpart 1 and 2 on how to implement the revised ozone standard is ambiguous does not mean that Table 1 in Section 181(a) and the sections implementing Table 1 also are ambiguous.
    - In fact, Table 1 very clearly only applies to the 1-hour standard, which EPA acknowledged in its brief to the Court in *Whitman.* Reply Brief at 18, n. 22 ("Section 181(a) does not provide classifications and attainment dates *for areas designated nonattainment under the revised ozone NAAQS."* ...Indeed, Section 181(a), which predated the revised ozone NAAQS by seven years, could not provide classifications and attainment dates for an ozone NAAQS that had not yet been promulgated) (Emphasis in original). The design values and attainment dates are specific. There is no ambiguity in such numbers. And, nowhere does the CAA give EPA the authority to revise the design values in Table 1.
- The Court decision did not give EPA any authority to rewrite Table 1.

- The Court's interpretation of 42 U.S.C. § 7511(b) suggesting that EPA can re-set the timelines in Table 1 to apply to the revised ozone standard is dicta and does not give EPA the authority to rewrite Table 1.

- Moreover, contrary to the intent of Options 2 and 3, the Court decision clearly did not require EPA to implement the revised ozone standard only under Subpart 2 and, in fact, reversed the Court of Appeals: "We cannot agree with the Court of Appeals that Subpart 2 clearly controls the implementation of revised ozone NAAQS..." *Whitman*, 531 U.S. at 481.

b. Classification under both Subpart 1 and 2 (Options 1 and 4)

Options 1 and 4 also are variations on the same theme, the primary difference being which design values are used to classify areas, which fall under Subpart 2. Both of these options are more acceptable that Options 2 and 3, but ultimately, they may fail for the same reasons:

- Options 1 and 4 still would require revision to the timelines in Table 1. In addition, Option 4 could require revision of the design values in Table 1. As noted above, EPA does not have discretion to rewrite Table 1.
- As for Option 1, there is no legal or rational basis for classifying areas for implementation of the 8-hour standard using 1-hour design values. The two standards are not closely related to each other.
- If Options 1 and 4 only would apply Subpart 2 to those areas that have not "attained" the 1-hour standard, they may be a reasonable accommodation, provided:
  - The 1-hour standard is revoked at the time of classification, and
  - The classification is structured so that the assignment of an area to Subpart 2 for implementation of the 8-hour standard was not permanent (*i.e.*, the area could revert to Subpart 1 at a later time once it could demonstrate it "attained" the 1-hour standard).
- Otherwise, Options 1 and 4 do not overcome the legal deficiency noted above.
  - As currently outlined by EPA, these options would force areas implementing the 8-hour standard to adopt measures and meet timelines that were designed for the 1-hour standard.

4. Revocation of the 1-hour standard cannot be simultaneous because the would upset the structure of Subpart 2

In reviewing the three options on revocation of the 1-hour standard, it is not completely clear what EPA is proposing. Nonetheless, the options essentially break down into two categories, those providing for sequential implementation and those providing for some sort of simultaneous implementation.

a. Sequential Implementation (Option 1 and possibly Option 3)

In ruling that the simultaneous implementation approach originally proposed by EPA was unlawful, the Court essentially recognized that sequential implementation is the only lawful implementation approach because simultaneous implementation violates the structure of Subpart 2, which limits EPA's discretion on how quickly it can require an area to come into attainment.

Option 1 is essentially a sequential implementation approach because it would revoke the 1-hour standard at the time of designation under the 8-hour standard.

- Option 1 is attractive because of its simplicity and the fact that it would avoid wasting state and EPA resources on compliance efforts to help meet the 1-hour standard that are ineffective on meeting the more protective 8-hour standard.
- However, Option 1 is not as legally defensible as the approach Intel suggested above that would retain the 1-hour standard until Subpart 2 is fully implemented.
- For Option 1 to be deemed "reasonable," at a minimum EPA would have to ensure that:
    - Non-attainment areas for the 1-hour standard retain Subpart 2 measures that already have been implemented; and
    - The attainment deadlines for compliance with the 8-hour standard extend beyond the Subpart 2 deadlines applicable to areas in non-attainment with the 1-hour standard.

Option 3 also would be a sequential implementation approach if the area were designated under the 8-hour standard *after* the area has met the 1-hour standard. If that is what EPA is recommending, Intel agrees with Option 3. That is part of what Intel considers the best legal approach to reconciling the ambiguity between Subparts 1 and 2. Conversely, if the area is designated under the 8-hour standard *before* the area has met the 1-hour standard, Option 3 would be a simultaneous implementation approach and its legal deficiency is addressed below.

b. Simultaneous Implementation (Option 2 and possibly Option 3)

Option 2 is legally deficient because it would require simultaneous implementation under both Subparts 1 and 2 for an extended period of time. Option 3 also may be legally deficient if it would require that an area be designated under the 8-hour standard *before* the area has met the 1-hour standard.

- The Option 2 requirement to adopt and begin implementing a SIP or TIP under the 8-hour standard, while simultaneously implementing the 1-hour standard, is precisely what the Court found unlawful about the earlier implementation policy.
    - The requirement for EPA approval of a SIP or TIP is not time limited and could extend the simultaneous implementation for a long period of time.

- Designation of 8-hour areas under Option 3 *before* the area has met the 1-hour standard also would be unlawful because it would require an area to begin to implement the 8-hour standard before the area meets the 1-hour ozone standard.
    - The 8-hour designation would trigger a duty to submit a SIP or TIP.
    - Under Section 110(a), EPA does not have authority to indefinitely delay the requirement to implement the 8-hour standard after designation until the non-attainment area meets the 1-hour standard.[2]
    - If a State fails to act, EPA must prepare a FIP.

5. <u>Whatever flexibility that is available under Subpart 2 would continue to be available for implementation the revised ozone standard</u>

EPA's four options on flexibility under Subpart 2 are essentially a sliding scale from no flexibility to various forms of limited flexibility. These options can be addressed with the same comments.

- The Court decision did not impact the flexibility EPA has under Subpart 2. The Court decision did not change the text of Subpart 2.
- In other words, EPA continues to enjoy whatever flexibility it had under Subpart 2 before adoption of the 8-hour standard.

Intel appreciates this opportunity to provide comments on the options discussed in the public workshops. Intel would welcome the opportunity to work with EPA on refining these options and developing an implementation policy that is legally defensible, cost effective, and practical. If you have any questions about any of these comments, please contact me at (480) 554-5870 or Todd Rallison at (480) 554-8454.

Sincerely,

Timothy G. Higgs
Environmental Engineer
Corporate Manager, Air Program
Intel Corporation

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[2] 42 U.S.C. § 7410(a)(1) ("Each State shall . . . adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)..., a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State.").